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No. 05-1120

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In The
Supreme Court of the United States

COMMONWEALTH OF MASSACHUSETTS, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF *AMICI CURIAE* OF ROBERT H. BORK, RONALD A. CASS, DOUGLAS W. KMIEC, RONALD D. ROTUNDA, AND JOHN YOO IN SUPPORT OF RESPONDENT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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INTEREST OF *AMICI CURIAE*[1]

Amici are, or have been, law professors specializing in constitutional law, international law or administrative law. Each has a personal and professional interest in the status and development of the law in these areas, and particularly in maintenance of the proper role of the federal courts in our constitutional system. In this regard, *amici* believe that the questions raised by this case now before the Court are of the highest importance, and that the Court's consideration of this matter would benefit from their views. The individual qualifications of *amici* are as follows:

Robert H. Bork is currently a Distinguished Fellow at the Hudson Institute, Washington D.C. He received his B.A. and his J.D. from the University of Chicago. Judge Bork was the Alexander M. Bickel Professor of Public Law at the Yale Law School from 1962 to 1981. He also has served as Solicitor General of the United States (1973-1977) the acting U.S. Attorney General (1973-1974) and judge, United States Court of Appeals for the District of Columbia Circuit (1982-1988).

Ronald A. Cass is the Dean Emeritus of Boston University School of Law, where he served as Dean from 1990-2004, the Chairman of the Center for the Rule of Law, and the co-Chair of the American Bar Association International Law Section, Intellectual Property Committee. An expert on intellectual property, antitrust, and

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[1] Pursuant to Rules 37.3(a) and 37.6, the undersigned state the parties have consented to the filing of this brief, that no counsel for any party authored this brief in whole or in part, and that no person or entity other than the *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

administrative law, Dean Cass has previously served as a Chairman of the American Bar Association Administrative Law Section, and as a professor at the University of Virginia and Boston University. He has a B.A. from the University of Virginia and a J.D. from the University of Chicago.

Douglas W. Kmiec is the Chair and Professor of Constitutional Law at Pepperdine University. He received his B.A. from Northwestern University and his J.D. from University of Southern California. Professor Kmiec has served as Head of the Office of Legal Counsel at the U.S. Department of Justice, as the Dean and St. Thomas More Professor of Law at The Catholic University of America, and as Professor of Law and the director of the University of Notre Dame's Center on Law and Government.

Ronald D. Rotunda is the George Mason University Foundation Professor of Law at the George Mason University School of Law. In the 1990s, he was the Constitutional Law Adviser to the Supreme National Council of Cambodia, helping draft that nation's first democratic constitution, and a consultant on constitutions and judicial codes to various emerging democracies in Eastern Europe. Professor Rotunda was the assistant majority Counsel for the Watergate Committee and, most recently, the Special Counsel to the General Counsel of the Department of Defense. He has co-authored several major works on constitutional law and legal ethics. Professor Rotunda has a B.A. and J.D. from Harvard University.

John Yoo is Professor of Law at the University of California, Berkeley School of Law – Boalt Hall. He earned his B.A. from Harvard University and his J.D. from Yale

University Law School. He has served as General Counsel to the U.S. Senate Judiciary Committee and as a Deputy Assistant Attorney General in the Office of Legal Counsel at the U.S. Department of Justice, where he was active in issues involving foreign affairs, national security and the separation of powers.

The views expressed herein are those of the individual *amici*, and do not necessarily represent the views of any group or organization with which any of them may be affiliated.

SUMMARY OF ARGUMENT

This case raises fundamental questions about the Judiciary's proper role in our constitutional scheme of government. It is, in fact, part of a multi-faceted effort to draw the federal courts into one of the most important and controversial foreign policy and political battles of our time – the issue of global climate change. To their credit, Petitioners have made no attempt to conceal this objective. As claimed in the original petition for rulemaking submitted to EPA in 1999: "the Administrator has a mandatory duty to regulate greenhouse gas emissions from new motor vehicles under § 202(a)(1) of the CAA. Petitioners urge the Administrator *to reduce the effects of global warming* by regulating the emission of greenhouse gases from new motor vehicles." Petition for Rulemaking and Collateral Relief Seeking the Regulation of Greenhouse Gas Emissions From New Motor Vehicles under § 202 of the Clean Air Act (Oct. 20, 1999), J.A. 5, 15 (emphasis added).

Global climate change is a highly complex phenomenon which, if Petitioners' claims regarding the scope and

seriousness of the problem are correct, can only be solved by a worldwide consensus in support of a worldwide solution. The United States' contribution to that solution must come as a result of actions taken by the political branches of government. Under our Constitution, the federal courts have a limited jurisdiction that is far more restrained than that which would support the relief the Petitioners seek. Indeed, even assuming that Petitioners have identified a sufficiently concrete and individualized injury resulting from global climate change, they have neither shown that EPA's failure to regulate emissions of "greenhouse gases," such as carbon dioxide, from new motor vehicles sold in the United States caused that harm, nor have they demonstrated how requiring such regulation would be likely to redress it. As a result, Petitioners do not have Article III standing to pursue this case.

ARGUMENT

I. Introduction

Global climate change is, of course, a complex political and scientific issue of enormous importance to the United States and the entire community of nations. As EPA explained in denying the petition for rulemaking in this case, climate change "has been discussed extensively during the last three Presidential campaigns; it is the subject of debate and negotiation in several international bodies; and numerous bills have been introduced in Congress over the last 15 years to address the issue." Control of Emissions from New Highway Vehicles and

Engines, 68 Fed. Reg. 52,922, 52,928 (Sept. 8, 2003), Pet. App. A-78.[2]

The relief Petitioners seek would, in fact, directly contravene current United States policy and could

[2] Congress has, in fact, taken a determined, if cautious, approach to global climate change for nearly thirty years - beginning with the National Climate Program Act of 1978, Pub. L. No. 95-367, 92 Stat. 601 (1978). This law required the establishment of a National Climate Program to "assist the Nation and the world to understand and respond to natural and man-induced climate processes and their implications," § 3, 92 Stat. at 601. The Global Climate Protection Act of 1987, Pub. L. No. 100-204, tit. XI, §§ 1103, 101 Stat. 1407, 1408-09 (1987), directed the Secretary of State to coordinate U.S. global climate change diplomacy. The Global Climate Protection Act also directed EPA to develop and propose to Congress a coordinated national policy on the issue. § 1104, 101 Stat. at 1409. The Global Change Research Act of 1990, Pub. L. No. 101-606, 104 Stat. 3096 (1990), established a Committee on Earth and Environmental Sciences to coordinate a ten-year research program, § 102, 104 Stat. at 3097, directed the President to establish a U.S. Global Change Research Program to "improve understanding of global change," § 103, *id.* at 3098, and provided for scientific assessments that "analyze[] current trends in global change" every four years, § 106, *id.* at 3101. This law also advised the President to direct the Secretary of State to "initiate discussions with other nations leading toward international protocols and other agreements to coordinate global change research activities," and "the development of energy technologies which have minimally adverse effects on the environment," § 203, *id.*, at 3102-03. The Energy Policy Act of 1992, Pub. L. No. 102-486, tit. XVI, §§ 1601-05, 106 Stat. 2776, 2999-3008 (1992), also required the Secretary of Energy to conduct several assessments relating to greenhouse gases and report to Congress. In particular, section 1604 called for a report of a "comparative assessment of alternative policy mechanisms for reducing the generation of greenhouse gases," § 1604, 106 Stat. at 3002. The alternative policy mechanisms to be assessed included: (1) "caps for the generation" of such gases from "major sources and emissions trading programs"; (2) "Federal standards for energy efficiency for major sources," including "power plants, industrial processes, automobile fuel economy, appliances, and buildings"; and (3) "[v]arious Federal and voluntary incentives programs." *Id.*

severely undermine the President's ability to achieve U.S. climate change policy goals at the international level. While some of the *amici* on this brief would question whether it is responsible *policy* for the United States to defer unilateral initiative on this issue, it is the policy choice of the politically accountable branches of our government to seek a comprehensive climate change solution and not to pursue the individualized approach Petitioners demand. President Bush made this position clear in 2001: "[e]ven with the best science, even with the best technology, we all know that the United States cannot solve this global problem alone. . . . [O]ur approach must be based on global participation, including that of developing countries whose net greenhouse gas emissions now exceed those in the developed countries." Statement of the President, June 11, 2001, *available at* http://www.whitehouse.gov/news/releases/2001/06/20010611-2.html, [hereinafter "Presidential Statement of June 11, 2001"].

This policy is, in fact, currently embodied in the United Nations Framework Convention on Climate Change ("UNFCCC"), June 12, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107, which established an international framework to address global climate change. The States Parties to the UNFCCC have agreed to "[f]ormulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, and measures to facilitate adequate

adaptation to climate change." UNFCCC, *supra*, art. 4, § 1(b).[3]

Since the UNFCCC came into force in 1994, annual "conferences of the parties" ("COP") have been held for the purpose of continuing multilateral climate change negotiations. *See* John R. Justus & Susan R. Fletcher, Congressional Research Service, *CRS Issue Brief for Congress: Global Climate Change*, 12 (Aug. 11, 2006), *available at* http://fpc.state.gov/documents/organization/73983.pdf.

These meetings have proven to be highly contentious and have highlighted the very deep differences in approach to the climate change issue that separate the United States from a number of its European allies. *See id.* at 13-17. These differences involve the very type of "remedy" Petitioners seek in this case: mandatory limitations on American greenhouse gas emissions without regard to other important aspects of a comprehensive climate change strategy, including more efficient energy technologies, carbon sequestration projects, and significant greenhouse gas emissions reduction commitments from the developing world. *See id.*

The UNFCCC did not impose binding emissions reductions requirements – although this was a "central issue" in the negotiations surrounding that agreement. 68 Fed. Reg. at 52,926, Pet. App. A-70. Mandatory limitations are contemplated by the UNFCCC's "Kyoto Protocol," which the United States has resolutely refused to ratify. It

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[3] In addition, pursuant to Articles 4 and 12 of the UNFCCC, the United States is committed to submit an annual national emissions inventory to the UNFCCC's secretariat. *Id.* arts. 4, 12.

has not ratified that agreement largely because the President perceives the Kyoto Protocol as not providing for a general global climate change solution that includes the developing countries. *See* Presidential Statement of June 11, *supra*.[4] Indeed, in the months leading up to the Kyoto meeting in 1997, the Senate passed (by a vote of 95-0) S. Res. 98, rejecting any agreement that did not require emissions limitations by developing countries. S. Res. 98, 105th Cong. (1997); *see also* 68 Fed. Reg. at 52,927, Pet. App. A-75. From 1998 through 2002, Congress specifically prohibited EPA from implementing the Kyoto Protocol without Senate approval of the treaty.[5] It stopped enacting such legislation only after President Bush announced that the United States would not ratify the Kyoto Protocol. *See* Pub. L. No. 107-73, tit. III, 115 Stat. 651, 683 (2002) (for fiscal year 2002).

Thus, the critical tenet of U.S. climate change policy is that this challenge can be met only by a truly global

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[4] Although President Clinton signed the Kyoto Protocol on November 12, 1998, he did not seek the Senate's advice and consent to ratification – "out of concern that the Senate would reject the treaty" in light of its controversial imposition of carbon dioxide emissions limitation requirements on the United States but not on developing nations. 68 Fed. Reg. at 52,927, Pet. App. A-75.

[5] *See* Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999, Pub. L. No. 105-276, tit. III, 112 Stat. 2461, 2496 (1998) (appropriating funds to EPA on the condition that "none of the funds appropriated by this Act shall be used to propose or issue rules, regulations, decrees or orders for the purpose of implementation, or in preparation for implementation, of the Kyoto Protocol"); Pub. L. No. 106-74, tit. III, 113 Stat. 1047, 1080 (1999) (placing identical conditions on appropriations for fiscal year 2000); Pub. L. No. 106-377, app. A, tit. III, 114 Stat. 1441, 1441A-41 (2000) (for fiscal year 2001). *See also* 68 Fed. Reg. at 52,927-28, Pet. App. A-72 – A-78.

response which includes developing countries and takes full account of the need for new technologies and carbon sequestration efforts.[6] Since 2001, U.S. diplomats have worked toward that end, both at annual COP meetings and in bilateral negotiations. In July, 2005, moreover, President Bush announced formation of the Asia-Pacific Partnership on Clean Development and Climate – an agreement including China, India and South Korea – all major greenhouse gas emitters excused from making reductions under the Kyoto Protocol. The other participants in the Partnership are the United States, Australia and Japan. *See* Office of the Press Secretary, White House Fact Sheet: President Bush and the Asia-Pacific Partnership on Clean Development (July 27, 2005), *available at* http://www.state.gov/g/oes/rls/fs/50314.htm.

Petitioners seek to remake U.S. climate change policy through litigation in the federal courts. Indeed, many of the Petitioners are currently involved in a case before the United States Court of Appeals for the Second Circuit, *Connecticut, et al. v. American Elec. Power Co.*, No. 05-5104 (oral argument heard June 7, 2006), in which they are trying to impose mandatory greenhouse gas emissions limitations on stationary sources through the use of a "public nuisance" claim.[7] The District Court properly

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[6] The Administration's overall position has been described by EPA as a "comprehensive approach to global climate change that calls for near-term voluntary actions and incentives along with programs aimed at reducing scientific uncertainties and encouraging technological development so that the government may effectively and efficiently address the climate change issue over the long term." 68 Fed. Reg. at 52,930, Pet. App. A-82.

[7] Similarly, the State of California, also a Petitioner in the instant case, recently filed suit against six American and Japanese automobile manufacturers in the United States District Court for the Northern

(Continued on following page)

dismissed this suit as nonjusticiable. *See Connecticut v. American Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005). Indeed, there are good constitutional reasons why courts in general, and especially the Court in this particular case, should steer clear of the global climate change melee.

II. Petitioners Lack Article III Standing.

Petitioners do not meet the minimum standing requirements the Constitution demands of anyone who wants an issue – however important or pressing – resolved by the federal judiciary. These are not prudential barriers; they arise from Article III's limitation of the federal judicial power to "Cases" and "Controversies." As this Court has made clear many times: "Art. III limit[s] the federal judicial power 'to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.'" *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982) (quoting *Flast v. Cohen*, 392 U.S. 83, 97 (1968)).

Standing, the Court has cautioned, is not "merely a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a lawsuit which a party desires to have adjudicated; it is a part of the basic charter promulgated by the Framers of the Constitution at Philadelphia

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District of California, basing another "public nuisance" claim on the alleged effects of "global warming." *See* California Attorney General Press Release, Attorney General Lockyer Files Lawsuit Against "Big Six" Automakers for Global Warming Damages in California (Sept. 20, 2006), *available at* http://ag.ca.gov/newsalerts/release.php?id=1338.

in 1787." *Valley Forge*, 454 U.S. at 476. Standing is also, of course, an aspect of jurisdiction of which the Court must satisfy itself before proceeding. *DaimlerChrysler Corp. v. Cuno*, __ U.S. __, 126 S. Ct. 1854, 1860 (2006). As the parties "invoking federal jurisdiction[,]" Petitioners "bear[] the burden of establishing its existence." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 104 (1998).

A. Petitioners' "Injury" is Speculative.

To establish standing, Petitioners must show that they have suffered an actual, legally cognizable injury because of the defendant's actions, and that this injury will likely be remedied by a favorable judicial decision. *See Allen v. Wright*, 468 U.S. 737, 751 (1984) ("A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."). Petitioners have not made this showing. As Judge Sentelle explained in his dissenting and concurring opinion below, in seeking a judicial remedy for global climate change, Petitioners have raised only general grievances based on an alleged injury that – if severe – is shared by humanity as a whole:

> Even in the light most favorable to the petitioners, in the end [their claims] come down to this: Emission of certain gases that the EPA is not regulating may cause an increase in the temperature of the earth – a phenomenon known as "global warming." This is harmful to humanity at large. Petitioners are or represent segments of humanity at large.

Massachusetts v. EPA, 415 F.3d 50, 60 (D.C. Cir. 2005) (Sentelle, J. dissenting and concurring), Pet. App. A-18.

Moreover, although Judge Tatel below concluded that Massachusetts had at least shown a particularized injury – "loss of land within its sovereign boundaries" because of rising sea levels, *id.* at 65 – this injury, like the many others Petitioners claim, is entirely speculative. Even if sea levels continue rising, Massachusetts' alleged injury is contingent upon certain assumptions about the likely economic and social consequences of having more of its existing territory below sea level.[8] Indeed, all of Petitioners' claimed injuries are dependent upon predictions and projections about how the Earth's climate has and will react to warming temperatures.[9]

Although these are the very types of predictions and assumptions that policymakers must often act upon, they are not sufficient to establish a legally cognizable injury. As the Court explained in *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983), "[a]bstract injury is not enough. The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' . . . and the injury or threat of injury must be both 'real and

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[8] States, of course, have many and varied interests – but it is unclear what legal principle would give them a judicially protectable interest in simply maintaining the status quo, or otherwise being insulated from change regardless of any actual damage that change may cause.

[9] Thus, for example, an increase in localized flooding (noted by one of Petitioners' Declarants as a likely result of global warming, *see* MacCracken Decl. ¶ 25, J.A. at 235) may, or may not, result in any tangible damage to Petitioners. This will depend entirely upon the severity and location of the actual events, when and if they occur. State governments, moreover, are not responsible for the costs of any and all damage occurring within their borders. Any loss to Massachusetts (or other states) here depends upon the assumption that state property itself will be affected, or that states will *choose* to take upon themselves some or all of the costs that may be incurred by others.

immediate,' not 'conjectural' or 'hypothetical.'" In that case, the Court denied standing because the plaintiff – who sought an injunction against the use of "chokeholds" by the local police – could only establish injury based on a series of assumptions about his conduct and that of others. *Lyons*, 461 U.S. at 105-06. The same is true in this case.

B. Petitioners Fail to Show Causation.

Petitioners also must show that the legally cognizable injury of which they complain was actually *caused by the agency action they challenge.* Petitioners have not made this critical showing. Indeed, based on Petitioners' own evidence, the causes of their alleged injuries began before the United States was founded as an independent nation and have involved human activities (*i.e.,* the "Industrial Revolution") that have been taking place on a global scale for more than two centuries.

Thus, for example, Dr. MacCracken's explanation of "the strong consensus of opinion among qualified scientific experts" can be summarized as follows: (1) Greenhouse gas concentrations have been increasing since 1750 because of human activity and are "very likely the dominant cause" of a warming climate during the 20th century; (2) "The most probable scenarios of future greenhouse gas emissions indicate that, in the absence of policy change, atmospheric concentrations of greenhouse gases will continue to rise steadily"; (3) Global warming has already had important environmental impacts, including warming oceans and melting glaciers that contribute to rising sea levels; and (4) the additional environmental impacts of "projected global warming" will include additional rises in sea level as well as "severe and irreversible changes to important

natural ecosystems." MacCracken Declaration, J.A. at 224-25, 229.

All of this may or may not be true, but it does not support the conclusion that EPA's failure to regulate greenhouse gas emissions from new motor vehicles sold in the United States has caused the problem. Here, the declarant simply claims that "[a]chievable reductions in emissions of CO_2 and other greenhouse gases from U.S. motor vehicles would significantly reduce the build-up in atmospheric concentrations of these gases and delay and moderate any of the adverse impacts of global warming," that the "U.S. transportation sector (mainly automobiles)" is responsible for "about 7% of global fossil fuel emissions," and that "emission reductions must be initiated in the near future in order to significantly reduce and delay the impacts of global warming." *Id.* at 225-26, 238-39.

Only through a series of additional assumptions about the importance of greenhouse gas emissions from new motor vehicles in the United States to the overall global climate change phenomenon – which Petitioners themselves argue can be traced to events beginning more than a century before motor vehicles were sold in the United States – could the Court match the injuries claimed by Petitioners to the agency action challenged in this suit. This, however, would be exactly the type of rank speculation the Court has held to be impermissible in determining standing.

In this connection, *Allen v. Wright* is especially instructive. In that case, the Court denied standing because of the speculative nature of plaintiffs' chain of causation and redressability claims. The injury plaintiffs asserted was "their children's diminished ability to receive an education in a racially integrated school." *Allen*, 469 U.S.

at 756. It resulted, they claimed, from IRS rules that failed to "detect false certifications of nondiscrimination policies" at private schools. *Id.* at 745. More rigorous standards, plaintiffs evidently believed, would have led to the denial of nonprofit tax status to additional *sub silencio* segregated private schools, reducing the number of such institutions in otherwise desegregating public school districts, and thus improving their children's chances of a desegregated education.

Although the Court fully acknowledged that the injury identified by plaintiffs was "one of the most serious injuries recognized in our legal system," it concluded that that injury was not "fairly traceable" to the challenged agency action. *Id.* at 756-57. It reasoned that "[t]he line of causation between that conduct [an effective grant of tax exempt status to some racially discriminatory schools] and desegregation of respondents' schools is attenuated at best." *Id.* at 757. The Court went on to explain that the chain of causation requirement would be met only if "there were enough racially discriminatory private schools receiving tax exemptions in respondents' communities for withdrawal of those exemptions to make an appreciable difference in public school integration," *and* if this result was not further dependent upon the independent decisions to be made by private school administrators and parents if the exemptions were withdrawn. *Allen*, 468 U.S. at 758.

Thus, if the United States were, in the future, to commit to reducing overall carbon emissions by, for example, 200 million metric tons per year, and, as a result of this Court's decision, EPA ultimately passed regulations that achieve reductions on the order of 20 million metric tons, there is no reason why those reductions would not be credited against the overall 200 million metric tons goal.

At best, a Court order could shape *where* future reductions come from – mobile sources versus stationary sources – rather than shaping the overall amount of future reductions. Petitioners' alleged harm would be entirely dependent on a decision by the political branches of government to mandate emissions reductions from new motor vehicles that are cumulative to, not a replacement for, reductions from other emissions sources. As in *Allen*, this independent decision by other branches of government interrupts the chain of causation linking EPA's denial of the rulemaking petition to the allegations of harm to Petitioners' interests.

The Court found a chain of causation to be similarly speculative, and hence unacceptable for standing purposes, in *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26 (1976). There, a number of indigents claimed that their access to non-emergency hospital services was effectively limited by federal rules allowing nonprofit hospitals which limited their treatment of indigents to emergency room care to enjoy tax status as charities. The Court rejected the suit on standing grounds because the injury complained of – fewer indigent hospital services – was not fairly traceable to the challenged tax rules. It reasoned that "[i]t is purely speculative whether the denials of service specified in the complaint fairly can be traced to petitioners' 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications." *Simon*, 426 U.S. at 42-43.

The same can be said for any connection between Petitioners' "injuries" and EPA's denial of the rulemaking petition in the instant case. To establish the necessary causation here, Petitioners would have to show that EPA's failure to regulate new motor vehicle greenhouse gas

emissions in the United States resulted in the climatological changes they predict will bring about the environmental harm they fear. Because human activities have been contributing greenhouse gas emissions to the atmosphere since 1750 (and actually for millennia if the use of wood, peat, and coal for fuel – all sources of carbon dioxide emissions – is taken into account), it is impossible for Petitioners to make this showing.

Assuming that the lack of United States regulation of new motor vehicle emissions has caused Petitioners' alleged injury would be far more speculative than concluding that IRS tax policies were responsible for the existence of too many secretly discriminatory private schools, or hospital decisions to limit indigent services. Indeed, it may well be that anthropogenic greenhouse gas emissions sufficient to cause the global warming trends at the base of Petitioners' injury claims had already been added to the atmosphere by the time the automobile was invented in the late 19th century.

Moreover, the actual damage Petitioners claim may be caused by entirely different phenomena. Thus, for example, Professor Kirshen – upon whose declaration Judge Tatel relied below – notes that

> In addition to these factors related to global warming, in the Boston area, land subsidence also contributes significantly to sea level rise. Over the past century, approximately 15 cm (5.9 inches) of the rise in sea level that has occurred in Boston is attributable to land subsidence. This rise in sea level due to subsidence would be expected in the next century in the Boston area regardless of, and in addition to, the projected rise in sea level due to climate change.

Decl. of Paul H. Kirshen, ¶ 6 (attached). (This issue was also noted by Dr. MacCracken. *See* MacCracken Decl., *supra* ¶ 23, J.A. at 234.) Petitioners have not shown how they would establish that the land losses Massachusetts fears would result from rising sea levels were caused by anthropogenic induced climate change, itself caused by EPA's failure to regulate greenhouse gas emissions from new motor vehicles sold in the United States, rather than from natural or manmade subsidence or other phenomena, including the state's own regulatory policies (or lack thereof). Petitioners must be able to show in a "concretely demonstrable way," that the challenged agency action has directly or indirectly caused the harm of which they complain. To state that it *might* be one of several causes is insufficient to satisfy the causation element of standing. *Warth v. Seldin*, 422 U.S. 490, 503 (1975).

C. Petitioners Fail to Show Redressability.

Finally, to meet their burden of establishing Article III standing, Petitioners must show how the ultimate relief they seek – an order requiring EPA to regulate greenhouse gas emissions from new motor vehicles in the United States – will remedy their particular injuries. As the Court cautioned in *Steel Co.*, "[r]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." 523 U.S. at 107. Given the nature and scope of the global climate change problem, it is entirely speculative whether such an order would benefit Petitioners in any way.

The Court most recently addressed the redressability requirement in *Cuno*, 126 S. Ct. at 1854. In that case, a

group of Toledo, Ohio, taxpayers sought federal court intervention against various local tax credits designed to benefit manufacturers. The Court rejected this claim to "taxpayer" standing both because plaintiffs failed to show how they were "injured" in any manner different from all other taxpayers *and* because "[e]stablishing injury requires speculating that elected officials will increase a taxpayer-plaintiff's tax bill to make up a deficit; establishing redressability requires speculating that abolishing the challenged credit will redound to the benefit of the taxpayer because legislators will pass along the supposed increased revenue in the form of tax reductions. Neither sort of speculation suffices to support standing." *Id.* at 1862-63. The Court also denied plaintiffs the benefit of an exception to the general rule against taxpayer standing for the same reasons. It noted that:

> Any effect that enjoining DaimlerChrysler's [tax] credit will have on municipal funds . . . will not result from automatic operation of a statutory formula, but from a hypothesis that the state government will choose to direct the supposed revenue from the restored franchise to municipalities. This is precisely the sort of conjecture we may not entertain in assessing standing.

Id. at 1866.

This conclusion is consistent with a long line of this Court's precedents. Redressability was critical to its decisions in the *Allen* and *Simon* cases. In *Allen*, the Court ruled that plaintiffs' assumption that a denial of the challenged tax exemptions would cause there to be a larger number of integrated schools was too speculative:

> [I]t is entirely speculative, as respondents themselves conceded in the Court of Appeals, whether

> withdrawal of a tax exemption from any particular school would lead the school to change its policies. It is just as speculative whether any given parent of a child attending such a private school would decide to transfer the child to public school as a result of any changes in educational or financial policy made by the private school once it was threatened with loss of tax-exempt status. It is also pure speculation whether, in a particular community, a large enough number of the numerous relevant school officials and parents would reach decisions that collectively would have a significant impact on the racial composition of the public schools.

Allen, 468 U.S. at 758 [citations omitted]. Similarly, in *Simon*, the Court ruled that plaintiffs lacked standing because

> [i]t is purely speculative whether the denials of service specified in the complaint fairly can be traced to [the IRS'] "encouragement" or instead result from decisions made by the hospitals without regard to the tax implication. It is equally speculative whether the desired exercise of the court's remedial power in this suit would result in the availability to respondents of such services. So far as the complaint sheds light, it is just as plausible that the hospitals to which respondents may apply for service would elect to forgo favorable tax treatment to avoid the undetermined financial drain of an increase in the level of uncompensated services.

426 U.S. at 43.

The requirement that the relief sought must actually redress the injury alleged is equally applicable in the environmental area. Although the Court has at times

permitted environmental plaintiffs to meet the "injury in fact" requirement with allegations of damage to "[a]esthetic and environmental well-being," *see Sierra Club v. Morton*, 405 U.S. 727, 734 (1972), it has never suggested that they may be excused from meeting the constitutionally-based redressability requirement. Thus, in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 568 (1992), a plurality of the Court noted that, in addition to failing to show injury, petitioners had failed to establish redressability. That case involved a challenge to an Interior Department rule, promulgated under the Endangered Species Act ("ESA"), requiring inter-departmental ESA consultations on projects or actions within the United States but not in foreign countries. Plaintiffs claimed that foreign aid monies administered by the United States Agency for International Development were supporting overseas programs that would harm various endangered species and, consequently, plaintiffs' later ability to observe, work with or enjoy those species.

As an initial matter, the Court in *Lujan* found plaintiffs' allegations insufficient to establish injury in fact because plaintiffs failed to show any imminent injury – such as plans to visit the areas affected by the contested projects. 504 U.S. at 564. A plurality noted that plaintiffs had also failed to meet the redressability requirement. *Id.* at 568. In this instance, a judicial order requiring inter-agency consultations for overseas projects would not have remedied plaintiffs' injury. First, the funding agencies "were not parties to the case." *Id.* Second, because U.S. funds were only part of the financing for the relevant projects, it was "entirely conjectural whether the non-agency activity [by and in foreign countries] that affects respondents will be altered or affected by the agency

activity [plaintiffs] seek to achieve. There is no standing." *Id.* at 571. *See also Warth*, 422 U.S. at 505-06 (plaintiffs' challenge to exclusionary zoning practices was not redressable because even if zoning ordinances were invalidated, plaintiffs could not give "any indication" that suitable low-income housing would actually be constructed); *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973) (plaintiff lacked standing where only result of requested order was jailing a "deadbeat dad" and any payment of actual support to plaintiff was speculative).

Petitioners' redressability claim is similarly contingent upon a number of assumptions regarding the likely actions of individuals, institutions and governments far beyond the Court's authority. It is accordingly unsurprising that one of Petitioners' primary experts on global climate change concentrated his testimony below on the question of whether other countries would follow the United States' lead in regulating carbon dioxide emissions from new motor vehicles. *See* Declaration of Michael P. Walsh (10 June 2004), J.A. 240. (A similar point was also made by Dr. MacCracken, *see* MacCracken Declaration, *supra*, at J.A. 239).

Mr. Walsh's opinion that "efforts to reduce emissions from U.S. motor vehicles would proliferate around the world as other countries again adopted similar regulatory requirements," J.A. 245, is, however, based on the same sort of speculation that this Court has found insufficient to establish standing in the past. Although, it is possible that other countries may choose to follow the United States' lead by imposing greenhouse gas emissions limitations on new motor vehicles, they are plainly not bound to do so and may decide otherwise.

Foreign governments may well take advantage of any competitive benefit new U.S. Clean Air Act regulations might supply them and might actually increase their own greenhouse gas emissions. This is precisely what happened after the United States adopted unilateral regulations on the global environmental issue of ozone depletion. As EPA explained in its notice denying the original petition for rulemaking in this case:

> Early U.S. controls on substances that deplete stratospheric ozone were not matched by many other countries. Over time, U.S. emission reductions were more than offset by emission increases in other countries. The U.S. did not impose additional domestic controls on stratospheric ozone-depleting substances until key developed and developing nations had committed to controlling their own emissions under the Montreal Protocol on Substances that Deplete Stratospheric Ozone.

68 Fed. Reg. at 52,931 n.5, Pet. App. A-86.[10]

EPA also noted the serious difficulties in trying to regulate global greenhouse gas emissions piecemeal:

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[10] Indeed, the Kyoto Protocol is widely viewed as a failure largely because of the difficult international interactions and policy issues involved. As explained in *The Economist* magazine:

> Kyoto's failure is hardly surprising. Agreeing on how to control carbon emissions is even harder than agreeing on how to promote free trade. Both issues require lots of countries to make political sacrifices to achieve a collective good; but at least in the case of free trade, the benefits accrue swiftly. The costs of cutting carbon emissions, by contrast, pile up in the short term, while the benefits are far-off and uncertain.

"Don't despair: Most of the news on the climate change front is bad, but not all of it," *The Economist*, Dec. 10, 2005, at 11.

> Unilateral EPA regulation of motor vehicle GHG emissions could also weaken U.S. efforts to persuade key developing countries to reduce the GHG intensity of their economies. Considering the large populations and growing economies of some developing countries, increases in their GHG emissions could quickly overwhelm the effects of GHG reduction measures in developed countries. Any potential benefit of EPA regulation could be lost to the extent other nations decide to let their emissions significantly increase in view of U.S. emissions reductions.

68 Fed. Reg. at 52,931, Pet. App. A-86.

By contrast, the likely impact of a judgment on plaintiffs' injury was far less speculative in *Bennett v. Spear*, 520 U.S. 154 (1997), where the Court found redressability sufficient for standing purposes. In that case, plaintiffs challenged a biological opinion, issued by the U.S. Fish and Wildlife Service ("FWS") pursuant to the ESA, after the Bureau of Reclamation determined that it would follow the opinion with respect to certain federal water projects. The plaintiff irrigation districts and ranchers feared that the Bureau's decision would reduce their water supplies. The lower courts dismissed the suit because they concluded that the plaintiffs' interests did not fall within the "zone of interests" protected by Congress in either the ESA or the Administrative Procedure Act citizen suit provisions. *Bennett v. Plenert*, 63 F.3d 915, 919 (9th Cir. 1995). This Court reversed.

First, the Court concluded that the plaintiffs' claims did fall within the "zone of interests" protected by Congress in the relevant legislation. *Bennett*, 520 U.S. at 164. It then addressed the causation and redressability standing

arguments raised by the Government as alternative bases for affirmance. In particular, the Government argued that redressability was not met in that case because the Bureau retained "ultimate responsibility for determining whether and how a proposed action shall go forward." *Id.* at 168. The Court disagreed, explaining that the FWS opinion had, in fact, "alter[ed] the legal regime to which the action agency is subject" in that the Bureau could take future action inconsistent with the opinion only at the risk of violating the ESA. *Id.* at 169-70.

Neither a decision by the Court requiring EPA to impose greenhouse gas emissions limitations on new motor vehicles, nor such a regulation itself, would alter the legal landscape in the manner described by the Court in *Bennett*. It would not prevent Congress from foregoing other emissions reductions in light of those achieved from motor vehicles and foreign states would be bound by neither the ruling nor any ensuring regulations. They would remain at liberty to permit the emission of greenhouse gases from new motor vehicles as they saw fit. Indeed, the regulation Petitioners seek might fail to affect climate change in any material way. Any credible solution must therefore be an international one. As Congress acknowledged when it first addressed the issue in 1978: "[c]limate fluctuation and change occur on a global basis, and deficiencies exist in the system for monitoring global climate changes. International cooperation for the purpose of sharing the benefits and costs of a global effort to understand climate is essential." National Climate Program Act of 1978, Pub. L. No. 95-367, § 2(5), 92 Stat. at 601.

None of this means that global climate change is not a serious issue, or that the Bush Administration's specific policies are the best means of addressing it. Indeed, not all

Amici on this brief agree with the Administration's current approach. They do, however, all agree on the importance of the separation of powers and that climate change must be addressed by the President and Congress, and not by the federal courts. An order granting Petitioners' desired relief would amount, at most, to a "statement" on the global climate change issue. It would not resolve the problem. As the United States courts have accepted and acknowledged since the Republic's founding, they are not in the business of making such statements. Petitioners have not established their right to bring this difficult and complex issue before the Court. Their petition should be dismissed.

CONCLUSION

For the reasons stated above, *Amici* urge the Court to remand this case to the court of appeals with instructions to dismiss it for lack of standing.

Respectfully submitted,

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October 24, 2006

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMMONWEALTH OF MASSACHUSETTS, et al.,	)	
Petitioners,	)	
v.	)	No. 03-1361 and
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	consolidated cases (Nos. 03-1362 through 1368)
Respondent.	)	

DECLARATION OF PAUL H. KIRSHEN

I, Paul H. Kirshen, declare as follows:

1. I am the Director of the Tufts Water, Sustainability, Health, and Ecological Diversity (WaterSHED) Center. I am also a Research Professor in the Civil and Environmental Engineering Department of Tufts University and the International Environment and Resource Policy Program of the Fletcher School of Law and Diplomacy.

2. I received a M.S. and Ph.D. in civil engineering from the Massachusetts Institute of Technology, Division of Water Resources, in 1972 and 1975, respectively. I received a Sc.B. in engineering from Brown University in 1970.

3. Since 1986, I have been conducting research in developed and developing countries on the impacts of global climate change on water resources, watershed planning, management and policy, water resources operations, decision support systems, and hydrology. Since 1999, I have been conducting research on the impacts of global

climate change on the metropolitan Boston area. One of the major research topics I have been studying is the effect of sea level rise on the metropolitan Boston coastal zone.

4. I have reviewed and am familiar with the major, peer reviewed scientific literature and international and domestic assessments on climate change, including, among others, the Intergovernmental Panel on Climate Change's (IPCC) *Third Assessment Report* (2001), the IPCC's *Workshop Report, Workshop on Changes in Extreme Weather and Climate Events,* Beijing, China (June 2002), the New England Regional Assessment Group's *Preparing for a Changing Climate: The Potential Consequences of Climate Variability and Change, New England Regional Overview* (2001), the Columbia Earth Institute's *Climate Change and a Global City: The potential Consequences of Climate Variability and Change – Metro East Coast* (2001), and the Pew Center on Global Climate Change's *Sea Level Rise and Global Climate Change: A Review of Impacts to US Coasts* (2000). I have also reviewed the Declaration of Michael MacCracken that is being filed in this case.

5. Based on my educational background, research, consulting, and other professional experiences, and my familiarity with the scientific literature and international and domestic assessments that are widely-accepted among the scientific community, it is my opinion that climate change is occurring and is responsible for an increase in sea level due to melting of ice on land and expansion of ocean water as it is warmed. Such a rise in sea level due to climate change is occurring on the coast of Massachusetts, in the metropolitan Boston area.

6. According to the IPCC's *Third Assessment Report* (2001), and as described in the Declaration of Michael

MacCracken, during the 20th century, a global average sea level rise of 10-20 cm (4-8 inches) has occurred, and, by 2100, it is projected that sea level will rise an average of 9-88 cm (4-35 inches), with the more likely range being 20-70 cm (8-28 inches), due to the meltback of mountain glaciers, warming oceans, and other factors affecting the amount of water stored in reservoirs and underground, all of which are brought about by global warming. In addition to these factors related to global warming, in the Boston area, land subsidence also contributes significantly to sea level rise. Over the past century, approximately 15 cm (5.9 inches) of the rise in sea level that has occurred in Boston is attributable to land subsidence. This rise in sea level due to subsidence would be expected in the next century in the Boston area regardless of, and in addition to, the projected rise in sea level due to climate change.

7. Based on this projected rise in sea level, more coastal land in the metropolitan Boston area is at risk of being permanently lost due to inundation and also of being periodically or temporarily lost due to flooding associated with storm surge.

8. In addition to permanent losses of land in the metropolitan Boston area, sea level rise will lead to more frequent and severe storm surge flooding events along the coast. Such periodic storm surge flooding is separate and apart from any increase in extreme weather events such as tropical and extra tropical storms that may occur as a result of changing weather patterns.

9. The way that a rise in sea level (as opposed to increased precipitation events) will cause periodic losses of coastal land due to flooding in the Boston area has to do with the relatively small difference between the elevations

of the 10-year, 100-year, and 500-year floodplains and the fact that any increase in mean sea level will add to the base elevation of any storm surge, thereby giving it more power to overtop both natural and man-made protection.

10. According to a report of the United States Army Corp of Engineers with which I am familiar, in the Boston area, there is only about a 0.3 meter (11.8 inch) difference in the storm surge elevation of a 10-year, 100-year, and 500-year flood. Thus, if sea level rises 0.3 meters (11.8 inches) – which is near the lower end of the likely range – that would mean the future 10-year flood surge elevation would be at the level of the current 100-year flood elevation and the future 100-year flood surge elevation would be at that of the current 500-year flood elevation. When such a rise in sea level occurs, a 10-year flood will have the magnitude of the present 100-year flood and a 100-year flood will have the magnitude of the present 500-year flood.

11. Based on this analysis, it is my opinion that when sea level rises 0.3 meters (11.8 inches) in the Boston area, we will experience the equivalent of what we now think of as a 100-year flood every 10 years. If the rise in sea level is even greater – which according to the IPCC and Dr. MacCracken is likely – than the Boston area will experience the equivalent of a 100-year storm on an even greater frequency than every 10 years. In fact, if the sea level rise is about 0.6 meters, the present 500-year flood will occur with a 10 year frequency.

12. To attempt to cost effectively protect portions of the Massachusetts coastline, there are measures that the Commonwealth could implement to attempt to prepare for the likely rise in sea level, such as construction of structures such as seawalls or groins and implementation of

beach nourishment or sand replenishment projects. Such projects would be quite costly.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Medford, Massachusetts, on June 15, 2004.

/s/ Paul H. Kirshen
Paul H. Kirshen, Ph.D.
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